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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, Debtor, *et als.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

WILLIAM D. WHITNEY,
Counsel for Respondent,
Irving Trust Company, as Trustee.

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 83 F. [2d] 207, the concurring opinion of Judge A. N. Hand appearing at page 209. The District Court rendered no opinion.

STATEMENT OF FACTS

The decision of the United States Circuit Court of Appeals for the Second Circuit, which this Court is now

asked to review, affirmed an order of the United States District Court for the Southern District of New York expunging that part of a claim filed by the petitioner, a former landlord of the Debtor, which sought recovery for loss of future rents and damages for alleged breach of a building covenant.

The claim was based on a ninety-nine-year net lease of property in Lincoln, Nebraska, made by the Debtor with the petitioner's predecessors in interest in 1922 (R. 9-41). Besides covenanting to pay taxes and insurance and to keep the property in good repair (R. 12, 18, 22), the Debtor had agreed that by July 1, 1942, it would demolish the existing building and erect in its stead a new four-story structure (R. 14). At the time it was adjudicated bankrupt upon its voluntary petition, August 29, 1932, the Debtor occupied a store in the leased premises and sublet the remaining space to other tenants. The Trustee in Bankruptcy, having found the lease burdensome, moved for leave either to reject it or, in the alternative, to assign it to the petitioner or her nominee (R. 161-163).

The petitioner chose the assignment to her nominee, which was effected by an agreement dated December 16, 1932, joined in by the Debtor (R. 87-96). This agreement provided, in addition, for the assignment to the petitioner's nominee of the subleases and the rents thereunder accrued and to accrue from September 1, 1932 up to the time of the surrender of the premises (R. 89). The petitioner expressly agreed to assume all obligations of the Debtor under the lease and the subleases and gave to the Debtor a general release from all claims with respect to the lease, except that the petitioner did not waive

> "the right to prove against the bankrupt estate any provable claims to which the Bankruptcy

> Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance." (R. 91, fols. 272-273).[1]

The petitioner also made an agreement with her nominee, effective upon the assignment of the lease, whereby the term of the lease was cut down so as to expire in 1937 instead of 2021, the annual net rental reduced by over a third and all provisions for the demolition of the existing building and the erection of a new one deleted (R. 195).

Notwithstanding the provisions of these two agreements, the petitioner filed in the prior bankruptcy proceedings of the Debtor, and refiled over a year and a half later in the present proceedings (which were commenced on June 9, 1934, upon the enactment of Section 77B[2]), a claim for (1) back taxes and the cost of repairs with respect to which the Debtor's liability had accrued prior to its bankruptcy in 1932,[3] and (2) unliquidated damages for alleged breach of the building covenant and for loss of future rent to accrue after the bankruptcy.

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[1]The petitioner argued below that this provision reserved to her the right to prove a claim in the subsequently instituted proceedings under the subsequently enacted §77B of the Bankruptcy Act; but the same contention was rejected by the Special Master, the District Court and the Circuit Court of Appeals (Judge A. N. Hand dissenting) in *In re United Cigar Stores Company (Claim of Otis, et al.)* 83 F. [2d] 202. The point is not assigned or specified as error in the petition for certiorari herein. (See petition at pp. 6-7).

[2]The Debtor's assets are now held by the respondent Trustee (R. 49-50); they have not been "recaptured" by or "restored" to the Debtor, as the petition erroneously states (pp. 2, 5, 8, 9, 10, and 11).

[3]These items have been allowed and are not in dispute.

On these facts the judges in the court below were unanimous in holding that the petitioner had no provable claim in the Debtor's reorganization proceedings under Section 77B. Two of the judges based their decision on the assignment agreement of December 16, 1932, whereby the petitioner, through her nominee, accepted a surrender of the lease and herself agreed to assume the Debtor's obligations thereunder. The third judge relied upon a provision in the lease that on its termination for default by the tenant the transfer to the landlord of the improvements, accrued rents and insurance policies should constitute liquidated damages (R. 28).

ARGUMENT

(1) Addressing herself to the ground of the majority opinion below, the petitioner contends that a landlord's claim for future rent in a 77B proceeding is not barred by an acceptance of surrender of the lease prior to the statute's enactment. This is said to follow from the language in the statute measuring a landlord's claim from

> "the date of *surrender of the premises* to the landlord or the date of reentry of the landlord,"

the argument being that by the use of the italicized words Congress must have intended a landlord to have a claim notwithstanding prior surrender of the lease.

The petitioner's error lies in misapprehending the phrase "surrender of the premises." These words have obviously a meaning different from that of "surrender *of the lease*," the latter being the technical phrase to describe termination of the landlord and tenant relationship, while the term "surrender *of the premises*" simply indicates the physical turn-over of the property necessarily consequent

upon the rejection of the lease by the trustee in bankruptcy. The technical "surrender," therefore, relates to the *leasehold estate,* while the term used in Section 77B relates only to delivery of the physical premises.

As construed by the petitioner, the statute would have the effect of giving to her a provable claim in a case in which she would have no surviving legal rights against the Debtor in the absence of bankruptcy or reorganization, and at the same time would take away from the Debtor, and from the Trustee of its estate, a valid defense (discharge of liability through the petitioner's acceptance of surrender). Even were there any support for this construction in the language of the statute or in its legislative history, it is doubtful whether such an exercise of the bankruptcy power of Congress would be constitutional (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 601).

(2) The only other question raised by the petition (other than the lower court's interpretation of the facts with respect to the assignment of the lease by the Trustee in Bankruptcy in lieu of rejection) is whether there can be any valid claim for damages based on the building covenant in the petitioner's lease, as distinguished from loss of future rent generally. The petitioner urges that such a claim would have been allowable under Section 63a of the Bankruptcy Act as it stood at the time of the Debtor's bankruptcy in 1932 and hence was not caught by the release in the assignment agreement of December 16, 1932, which was qualified to except such claims.

In deciding against this contention, the court below was only adhering to its earlier ruling in a case of almost parallel facts, *Tipton et al.* v. *Irving Trust Company,* 74 F. [2d] 45, as to which this Court denied certiorari, 295 U. S. 747.

(3) But whatever be the merits of the foregoing questions (which were those considered determinative by the majority of the court below), the petitioner does not even attempt to meet the ground of the decision of the concurring judge (Judge A. N. Hand). His opinion was based upon the explicit provision of the lease (R. 28) that on its termination for default by the tenant the transfer to the landlord of the improvements, accrued rents and insurance policies should constitute liquidated damages. Since such a transfer was effected here by assignment of the leasehold, the liquidated damages became operative, thus barring any further claim. The point disposes of the petitioner's case regardless of other points.

CONCLUSION

The petition clearly fails to present any of the questions which normally justify certiorari. The decision below does not involve legal issues of general importance, and it is not inconsistent with applicable decisions of this Court nor in conflict with the views of any other circuit court. It certainly cannot be said that in this case the court below has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It is therefore respectfully submitted that no sound reason exists in this case for a review by this Court and that the petition for a writ of certiorari should accordingly be dismissed, with costs.

WILLIAM D. WHITNEY,
Counsel for Respondent,
Irving Trust Company, as Trustee.

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BRIEF FOR RESPONDENT TRUSTEE

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Irving Trust Company as Trustee.

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